

In the Matter of)
)
Petition of the Verizon Telephone Companies for)
Forbearance under 47 U.S.C. § 160(c) from Title) WC Docket No. 04-440
II and Computer Inquiry Rules with Respect to)
Their Broadband Services)
)

(“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced docket.¹

In December 2004, Verizon filed a petition² seeking forbearance pursuant to Section 10 of the Communication Act of 1934, as amended (“Act”).³ Verizon sought relief from Title II and the *Computer Inquiry Rules*⁴ to remove traditional common carrier regulations from its broadband services. In 2005, Advocacy urged the FCC

¹ In the Matter of Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440.

² Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (December 20, 2004).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴ See, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C.2d 384 (1980); *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*; 1988 *Biennial Review—Review of Computer III and ONA Safeguards and Requirements*, Report and Order, 14 FCC Rcd 4289 (1999)(collectively the “Computer Inquiry Rules”).

to consider the impact that granting forbearance from Title II and the Computer Inquiry rules on broadband services offered by Verizon would have on small telecom entities.⁵ In March 2006, Verizon's petition was approved by "operation of law" after the Commission failed to take action on the forbearance request.⁶ Because this petition was granted procedurally, the public record lacked analysis explaining how this petition satisfied the three criteria for forbearance established by Congress in Section 10 of the Communications Act of 1996.⁷ Specifically, the record did not contain consideration of how granting this petition may or may not impact small businesses.

The Washington Bureau for Internet Service Providers (ISP) and the Federation of Internet Solution Providers of the Americas had both expressed concern that this particular grant of forbearance to Verizon would adversely impact small ISPs. Therefore, in accordance with the Regulatory Flexibility Act (RFA),⁸ Advocacy requested that the FCC consider the economic impact on small businesses as a part of the public interest criteria in Section 10 petitions.⁹ Several groups have asked the Commission to review the Verizon forbearance grant, and on July 30, 2007, the Commission released a public notice in response to a petition by Covad Communications Group, NuVox Communications, Inc., and XO Communications,

⁵ See Reply Comments of the Office of Advocacy, WC Docket No. 04-440.

⁶ FCC News Release, Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law (March 20, 2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.doc.

⁷ 47 U.S.C. § 160(a).

⁸ Pub. No. 96-354, 94 Stat. 1164 (1980).

⁹ See Reply Comments of the Office of Advocacy, WC Docket No. 04-440.

LLC which requests that the FCC issue a written order on the Verizon petition.¹⁰

In response to the Commission's request that interested parties comment on this petition, Advocacy submits the following comments.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act ("RFA") is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.¹¹ Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.¹²

On August 13, 2002, President George W. Bush signed Executive Order 13272 that highlights the President's goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies can properly consider the impact of their regulations on small entities.

¹⁰ Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No 04-440 (July 25, 2007).

¹¹ Pub. No. 96-354, 94 Stat. 1164 (1980).

¹² Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

2. The FCC Breached its Requirements Under the RFA in Granting Verizon's Petition Via Operation of Law

The RFA requires agencies to consider the impact of their regulatory proposals on small entities and to analyze alternatives that would minimize this impact.¹³ Advocacy asserts that this includes both regulatory and “deregulatory” actions.¹⁴ Given the nature of the Commission’s forbearance process, it is in both form and function the equivalent of a rulemaking, and should be conducted with some type of notice and comment period, and an appropriate analysis under the RFA.¹⁵ A key component of the RFA analysis is the interaction between agencies and small businesses. By receiving small business input on important issues, agencies are able to enrich their analysis and give small businesses a voice in the process.¹⁶ This cooperation provides agencies with the best decision-making tools, and establishes a record that shows how the agency reached a particular conclusion,

¹³ 5 U.S.C. § 603.

¹⁴ Advocacy classifies forbearance under Section 10 of the Communications Act as a deregulatory action and a logical component of the broader regulatory process.

¹⁵ The APA defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting or practices bearing on any of the foregoing.” 5 U.S.C. § 551(4). *See also, Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp. 858 (D. Del. 1970)(stating that the test for determining a rule is whether an agency’s proposal will have a substantial impact on the regulated industry, or an important class of the members or the products in an industry). *See also, National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) *cert denied*, 459 U.S. 1205 (1983)(finding that an “administrative instruction” qualifies as a rule).

¹⁶ This comports with the requirements of Section 10 of the Communications Act, which sets out a three prong test that must be met before forbearance can be granted by the Commission. The third prong of this test requires the forbearance to be “consistent with the public interest.” 47 U.S.C. § 160 (a).

or chose a particular regulatory alternative.¹⁷ While the forbearance process differs to some extent from a notice and comment rulemaking under the APA, they both result in agency action that impacts small businesses. Therefore, the slight differences associated with forbearance v. rulemaking should not undercut the importance of understanding the reasoning behind how the FCC arrives at regulatory decisions.

Because the Verizon petition was granted procedurally, the public record lacked analysis explaining how this petition satisfied the three criteria for forbearance established by Congress in Section 10 of the Telecommunications Act of 1996.¹⁸ Specifically, the record failed to contain consideration of how granting this petition may or may not impact small businesses. Advocacy believes that this type of regulatory inaction was arbitrary and capricious under the Administrative Procedure Act (“APA”).¹⁹ Therefore, by breaching their responsibilities under the APA, the FCC has failed to comply with the RFA, which requires that agencies account for the regulatory impact of their rules on small entities. Courts have held that the RFA mandates that an agency describe the steps it took to “minimize the

¹⁷ This point was made by FCC Commissioner Michael J. Copps in his concurring statement in the Fones4AllCorp Petition for Expedited Fobearance. FCC Dkt. No. 06-145

¹⁸ 47 U.S.C. § 160(a)(explaining that the FCC may forbear from applying regulation to a telecommunications carrier or class of carriers if the FCC determines that: (1) enforcement of the regulation is not necessary to ensure that the charges and practices are just and reasonable and are not unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.

¹⁸ FCC News Release, Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law (March 20, 2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.doc.

¹⁹ 5 U.S.C. § 706 (2) (A). Under the APA courts are empowered to reverse agency action that is “arbitrary and capricious.”

significant economic impact on small entities consistent with the stated objectives of applicable statutes.”²⁰ The lack of “substantial discussion and deliberation” on this point leads Advocacy to conclude that the FCC failed to reasonably comply with the requirements of the RFA.²¹

3. The FCC Should Issue an Order on the Verizon Petition in the Interest of Good Governance and Transparency

The FCC’s omission of any analysis in the forbearance process amounts to a procedural flaw.²² The grant is especially damaging because Verizon amended its request to a narrower form of regulatory relief in an *Ex Parte* letter, leaving some industry players confused with regard to exactly what the Commission’s forbearance grant covered.²³ In the interest of good governance and transparency, it is important that the Commission publish the well-reasoned analysis it conducted in deciding whether to grant Verizon’s regulatory request. Additionally, it is critical that the FCC alleviate any confusion that the public may have with regard to precisely what the forbearance grant covers.²⁴

²⁰ 5 U.S.C. § 604 (a) (5).

²¹ See Associated Fisheries 127 F. 3d at 115.

²² See Associated Fisheries 127 F. 3d at 114. See also *Alenco Communications, Inc. v. FCC*, NO.98-60213 (5th Cir. 2000).

²³ Letter from Edward Shakin, Vice President & Associate General Counsel, Verizon WC Docket 04-440 (February 7, 2006)(clarifying Verizon’s broadband forbearance request and narrowing the request pursuant to statements by Commissioners Martin and Tate). Commissioners Martin and Tate indicated in a joint statement that a limited version of the relief requested by Verizon might receive greater FCC support. See, *Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate*, WC Docket No. 04-440 (rel. March 20, 2006).

²⁴ The Covad petition points to the fact that Verizon fails to specify what is meant when it requests relief for “broadband services.” See, Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No 04-440 (July 25, 2007). The petition also explains how similar carriers have followed suit in requesting the relief Verizon received. See also, Joint Comments of Time Warner Telecom, XO Communications, Lightship Telecom and Conversent Communications, 4-6, WC Docket No. 04-440

Based on the comments of various industry stakeholders affected by Verizon’s grant of forbearance, Advocacy believes that the FCC could remedy the negative impact of the Verizon petition’s grant by issuing an order to explain the Commission’s decision.²⁵ Congress likely intended the forbearance rules to benefit parties by ensuring that the Commission considered petitions in a timely manner, hence the ultimate grant via “operation of law” in the event of no FCC action.²⁶ Even if this procedural grant was the only way the FCC could decide upon the Verizon request for relief, there is nothing that bars the Commission from issuing a subsequent analysis of its decision-making process.²⁷ Advocacy believes that by issuing an order, the FCC will enhance government transparency and further promote the good governance that all agencies should strive to maintain.

4. Conclusion

Advocacy urges the Commission to heed the concerns expressed by the various parties in the above-referenced docket. Enabling public participation in the forbearance process will provide the public with a clear and accurate understanding of the Commission’s reasoning in granting regulatory relief to certain carriers. Further, it is important that small businesses have a voice in the regulatory process

(February 8, 2006).

²⁵ Motion for Expedited Order on Verizon Petition for Forbearance, 9, WC Docket No 04-440 (July 25, 2007)(explaining that there is support for FCC authority to rule on the petition despite the passage of the statutory deadline).

²⁶ The imposition of a statutory deadline and a 90-day extension period seems to suggest that Congress wanted the Commission to act as expeditiously as possible, to avoid undue delay to the petitioning parties.

²⁷ See, Motion for Expedited Order on Verizon Petition for Forbearance, 11, WC Docket No 04-440 (July 25, 2007)(citing *Brock v. Pierce County*, where the Supreme Court refused to conclude “that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.”). See also, *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)(“Brock”).

when important agency decisions will have a significant impact on them. Therefore, we first encourage the FCC to conduct the requisite analysis of the Verizon forbearance petition, via rulemaking or other appropriate means. Second, at a minimum, we urge the Commission to clarify for industry what “broadband services” are included in this grant of regulatory relief.

The Office of Advocacy is available to assist the Commission in its outreach to small businesses or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or cheryl.johns@sba.gov.

Respectfully submitted,

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Office of Advocacy
Comment
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04-440

WC Dkt. No.

cc:

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Commissioner Michael J. Copps

Commissioner Jonathan S. Adelstein

Commissioner Deborah Taylor Tate

Commissioner Robert M. McDowell

Susan Dudley, Administrator, Office of Information and Regulatory Affairs

via electronic filing

Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this August 13, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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